Supreme Court, U.S.
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No. 10-

IN THE
Supreme Court of The United States

STEPHEN MURPHY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID A. SMYTH
1990 N. CALIFORNIA BLVD., #830
WALNUT CREEK, CA 94596
(925) 933-4541
smythlaw@gmail.com
Attorney for Petitioner

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

QUESTION PRESENTED

1. Is the Government time barred from collecting on an Order for restitution under the VWPA, where periodic payments have been ordered, more than five years after probation has terminated?

LIST OF ALL PARTIES

The caption of the case in this court contains the names of all parties (Stephen Murphy and the United States).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Stephen J. Murphy petitions this Court for a writ of certiorari to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth circuit filed and entered on July 1, 2010.

OPINIONS (AND ORDERS) BELOW

The Ninth Circuit's Memorandum Opinion (per Trott, J., with Fletcher and Mahan, J.J.) a copy is App. 1. The District Court's Order Denying Defendant's Motion to Dismiss and to Quash the Writ of Garnishment was filed on May 11, 2009., and is App 2. And the Memorandum (Opinion) by the Ninth Circuit Court of Appeals is App 3.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the denial of Petitioner's motion to dismiss the complaint of The United States of America vs. Stephen J. Murphy, Case No. CV 08-6520-R(SSx) and to quash a writ of execution on Petitioners income to satisfy a judgment in a criminal case was filed and entered on July 1, 2010. App 3, page 1.

This petition is timely filed. Rules 13.1, 13.3, 30.1, 28 U.S.C. 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

FEDERAL STATUTES INVOLVED

18 United States Code 3663(a) (as worded at the time of Petitioner's offenses in 1992) stated (under it's previous numbering 3679(f)(2)(A)).

> (1) The court may require that such defendant make restitution ... within a specified period or in specified installments.
>
> (2) The end of such period or the last such installment shall not be later than —
>
> (A) the end of the period of probation, if probation is ordered;
>
> (B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and
>
> (C) five years after the date of sentencing in any other case.
>
> (3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

STATEMENT OF THE CASE

FACTS

The facts are stated in the light most favorable to the judgments and opinion below.

On March 15, 1999, Petitioner pleaded guilty to violation of 18 U.S.C. 1344 (2b) mail fraud (Counts 1-5) and 18 U.S.C. 10142(b) False Statement to a Financial Institution, Causing an Act to be Done

(Count 16 First Superseding Indictment). These charges concerned violations committed in 1992.

This plea was pursuant to a plea agreement. Petitioner agreed (as part of this agreement) to pay $14,048,372.32 (Fourteen million forty eight thousand three hundred and seventy two dollars and thirty two cents) in restitution. App 1, page 3.

The District Court did not mention the plea agreement either at the time of sentencing or in the Judgment – Commitment Order, Attachment 1.

The District Court (Sentencing Court) sentenced petitioner to pay restitution of $14,048,372.32 and to serve 60 months in prison. App 1, page 3.

The Court ordered Petitioner to pay installment payments while on probation of $500.00 (Five hundred dollars) a month. App 1, page 4.

In ordering these payments of $500.00 per month the Sentencing Court stated in the Commitment Order, App 1, "Nominal restitution payments are ordered as the Court finds that the substantial restitution amount and the defendant's economic circumstances might not allow for either immediate or future payment of the amount owed."

Petitioner was also ordered to make payments, after the termination of probation as directed by the United States Attorney. App 1, page 4.

Petitioner was ordered to pay restitution as a condition of probation. App 1, page 1.

The Sentencing Court found that the Petitioner did not have the financial means to pay a fine and so remitted the fine. The Court also found that an order requiring payment of a fine would unduly burden the Petitioner's relatives. App 1, page 4.

PROCEDURAL HISTORY AFTER GARNISHMENT IN DISTRICT COURT

In September 2007 Petitioner's probation ended. Thereafter the Government filed a civil complaint, Case No.CV 08-6520-R(SSx) to execute on the restitution order contained in Att. 1 – the Judgment and Probation Commitment Order. Petitioner filed a Motion to Dismiss; Quash the Writ of Attachment, and Correct the Judgment. The basis for the part of the motion to dismiss and to quash the garnishment order was that 18 U.S.C. 3663 (a)(2)(A) limits the time for collection of restitution (for a defendant put on a payment schedule) to before the end of probation.

The Government filed an opposition. The District Court Judge Real, denied Petitioner's motion on the basis that 18 U.S.C. 3663(a)(2)(A) did not limit the time for collection and because Petitioner had stipulated to the amount of restitution, and because the sentencing court had ordered payment after probation (as directed by the U.S. attorney). The date of denial of the motion was May 11, 2009. App 2, page 2.

PROCEEDINGS IN THE NINTH CIRCUIT

Petitioner timely filed a notice of appeal of Judge Real's order.

Petitioner filed an opening brief; the Government filed a responsive brief; and Petitioner filed a reply brief.

The issues raised in Petitioner's briefs were the limitation on time of collection under 18 U.S.C. 3663(b)(2), and an allegation that the Sentencing Court's judgment and probation Commitment Order was ambiguous.

(The allegations and ruling re ambiguity are not asserted in this Petition).

The Ninth Circuit fled a memorandum opinion, attachment 3, ruling in favor of the Government and denying Petitioner's appeal on the grounds that 18 U.S.C. 3663(a)(2)(A) is not a limit on the time to collect (but is a limit on the sentencing Judge's power to defer full payment), Att. 3.

The Ninth Circuit also ruled against Petitioner because the Petitioner had agreed to full restitution. Att. 3, page 3. The Ninth Circuit also ruled that Petitioner had waived his right to challenge the amount of the restitution by failing to file a direct appeal. App 3, page 3.

(The Court found the issues of "ambiguity" to have been waived because not raised in the opening brief), Att. 3.

REASONS FOR GRANTING THE WRIT

There is a split among the Circuits and among Courts as to whether 18 U.S.C. 3663(a) limits the time period during which restitution may be collected from a Defendant ordered to make periodic payments. Although this statute is no longer in

effect there exists presently disparate treatment of defendants under Court orders to pay restitution that exists solely because of the Federal Circuit of their residence.

I. PETITIONER ASSERTS THAT 18 U.S.C. 3663(a) LIMITS THE TIME PERIOD DURING WHICH RESTITUTION MAY BE COLLECTED FROM A DEFENDANT ORDERED TO MAKE PERIODIC PAYMENTS

The maximum five year limit for those payments is set forth in the applicable statute, the Victim and Witness Protection Act of 1982 ("VWPA"). That statute expressly limited the Government's authority to order restitution payments and the Government's authority to collect restitution, 18 U.S.C. section 3663 and 18 U.S.C. 3579, reclassified as 18 U.S.C.3663(a)(2)(a) effective November 1, 1987 pursuant to the Sentencing Reform Act of 1984, 98 stat. 1987 (both numbers will be cited in the petition – they are the same statute) states:

> (1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.[¶] (2) The end of such period or the last such installment shall not be later than –
>
> A. the end of the period of probation, if probation is ordered;

B. five years after the end of the term of imprisonment imposed, if the court does not order probation; and

C. five years after the date of sentencing in any other case.

Petitioner's position in the Court's below was: After September 2007, the Government lost its legal authority to impose or collect restitution from Mr. Murphy, based on the VWPA. That statute expressly prohibited restitution beyond the end of Petitioner's probation, 18 U.S.C. section 3663(f)(2)(A). This statute in petitioner's view (and that of numerous courts) states the power of the district court to "require" an installment ceases after 5 years – for those defendants "require(d) to pay" in specified installments. Any payment after 5 years even a payment in full is an "installment" and cannot be "required."

The VWPA was the general restitution statute and it authorized the District Courts to order restitution to the victims of any crime. *United States v. Baggett,* 125 F.3d 1319, 1321 (9th Cir. 1997). "A federal court has no inherent authority to order restitution in a criminal case; it may do so only as expressly provided by statute." *United States v. Gilbert,* 75 F.3d 15, 22 (1st Cir. 1996); *United States v. Lampien,* 89 F.3d 1316, 1322 (7th Cir. 1996). Even if the statute was ambiguous as to payment obligations after the maximum time period, a Court must apply the rule of lenity to resolve ambiguities in favor of a defendant when a criminal statutory term is ambiguous and cannot be clarified by the

statute's history or structure. *United States v. Jackson*, 401 F.3d 747, 750 (6th Cir. 2005).

The Ninth Circuit acknowledged that there is support for the limitations on collection asserted by Petitioner by citing two cases which hold contrary to the memorandum, i.e., *U.S. v. Bruchey*, 810 F.2d 456 (4th Cir. 1987) and *U.S. v. Brown*, 744 F..2d 905 (2d Cir. 1984, *See fn3, Memorandum, Att. 1.*

STATUTORY PURPOSE OF 5 YEAR LIMIT. This five year provision tracked the time period during which the Government supervised the debtor. At that time, the maximum term for supervised release was also five years. 18 U.S.C. §§ 3583 and 3561. All governmental collection actions regarding restitution had to occur while the defendant was lawfully under governmental supervision. In fact, the Senate Report on the Victim and Witness Protection Act of 1982 specifically mentions the "practical necessity in limiting both the amount of restitution ordered and the period during which restitution payments are ordered to be made." S. Rep. 532, 97th cong. 2d Sess. 32 reprinted in 1982 U.S. Code Cong. & Ad. News 2538. (There is no such Congressional support for the view that this statute is a limitation on the power of the Court to defer full restitution).

THE FIVE YEAR LIMIT HAS EXPIRED. Mr. Murphy was convicted of offenses which occurred in the year 1992. See original Indictment. On March 19, 1999, Judgment was entered against Mr. Murphy. Ex. 1 (Judgment and Probation/Commitment Order). The Judgment required payments after release in the amount of

$500.00 per month.. The restitution is unquestionably based on 18 U.S.C. § 3663. Ex. 1 at page 3. Mr. Murphy was incarcerated from April 1999 to September 2002. Mr. Murphy's five year supervised release was from September 2002 until September 2007. The five year period has expired.

JUDICIAL APPLICATION. According to each of the following courts, any collection efforts by the Government are now prohibited because Petitioner's probation has ended (and in addition, five years have expired since Mr. Murphy's imprisonment ended in September 2002):

> Second Circuit: Congress provided for payment of restitution during a period of up to five years after the completion of any prison sentence imposed. Id. § 3579(f)(2)(B). *United States v. Brown,* 744 F.2d 905, 911 (2d Cir. 1984), *cert. denied*, 469 U.S. 1089 (1984).
>
> Fourth Circuit: The Government cannot compel defendant to sign restitution note extending payments past limitations period. *United States v. Bruchey,* 810 F.2d 456, 459-460 (4th Cir. 1987) (bold added):
>
> "**[t]he VWPA quite clearly 'limits the period within which restitution is due.**"
>
> Sixth Circuit: The government's ability to enforce a restitution order is limited by § 3663(f). *United States v. Joseph* , 914 F.2d 780, 786 (6th Cir. 1990) (bold added), noting that:

"[t]he life of a restitution order is expressly limited by § 3579(f)."

[Effective November 1, 1986, section 3579 was revised and renumbered as 18 U.S.C. § 3663. *United States v. Joseph,* 914 F.2d 780, 783 (6th Cir. 1990).]

Once a restitution order expires, the government cannot collect on an unpaid restitution obligation. *United States v. O'Brien,* 109 Fed. Appx. 49, 51-52 (6th Cir. 2004); *United States v. Gump,* 1994 U.S. Dist. LEXIS 11577, * 2-4 (W.D. Mich. July 13, 1994) (the "court may not extend the restitution period beyond maximum time limits . . . the restitution order no longer is in effect" so Judgment issued for Defendant because the Government could not enforce the restitution order beyond the statutory time limits).

Seventh Circuit: Section 3663(f) limits the period in which payment is due, even if payments are ordered immediately. *United States v. Fountain,* 768 F.2d 790, 803 (7th Cir. 1985) (bold added):

"The statute limits the period within which restitution is due; so far as relevant to this case, **the outer limit is five years after the defendant is released from prison**. See 18 U.S.C. § 3579 [former version of 18 U.S.C. § 3663, renumbered in 1982 with the passage of the Sentencing Reform Act of 1984].

See also *United States v. Keller,* 1993 U.S. Dist. LEXIS 8106 (N.D. Ill. June 16, 1993)

(bold added) ("[t]he restitution order, however, **extends only for five years after the end of the term of imprisonment imposed,** 18 U.S.C. § 3663(f)(2)(B)").

Tenth Circuit: *United States v. Diamond,* 969 F.2d 961, 969 (10th Cir. 1992).

Eleventh Circuit: The VWPA "**clearly provides a five-year time limit on all restitution obligations.**" *United States v. Holland,* 380 F.Supp. 2d 1264, 1269 (N.D. Ala. 2005) (bold added).

A. **Ninth Circuit cases supporting the Government's position rely on dicta.**

If a defendant, ordered to pay restitution, is ordered to make periodic payments, restitution must end after 5 years. The cases which so hold, all depend on 18 U.S.C. 3663(a)(2)(A) which specifically applies only to defendants who are put on a periodic schedule.

"Periodic Payments" are a condition precedent for a time limitation on restitution. Therefore, it is odd that *United States v. Keith,* 754 F.2d 1388 (9th Cir. 1985), a case where periodic payments were not ordered; is cited for the view that 18 U.S.C. 3663(a)(2)(A) is not a limit on restitution. (See *U.S. v. Keith,* 754 F.2d 1388, 13."

The meaning of 18 U.S.C. 3663(a)(2) was not at issue in *United States v. Keith,* 754F.2d 1388··· the opinion in that case concerning this statute was dicta.

The Ninth Circuit cited *U.S. v. Keith*, 754 F.2d 1388 as support for its decision in *United States v. Soderling* 970 F.2d 529 for the same holding, i.e., that the "5 year rule" (18 U.S.C. 3663(a)(2)(A) is a limitation on the judge's power to defer full payment of restitution.

This statement in *U.S. v. Soderling*, 970 F.2d 529 is dicta as there is no statement in that case those periodic payments were ordered.

The court in *U.S. v. Soderling*, 970 F.2d 529 also cites U.S. v. House, 808 F.2d 508 (9th Cir. 1886).

The opinion in *U.S. v. House* does not support the Government.

The court in *U.S. v. House*, 808 F.2d 508 (7th Cir. 1886) relies on *U.S. v. Keith*, 754 F.2d 1388 (in part) for its conclusion.

The opinion in *U.S. v. House*, 808 F.2d 508 (9th Cir. 1886), also involved a defendant who had not been ordered to make periodic payments, but had been ordered to reimburse the state for funeral expenses for the man he murdered.

The court in *U.S. v. House*, 808 F.2d 508 (7th Cir. 1886) stated that the restriction on the length of restitution did not apply if periodic payments were not ordered (the implication being that the restriction did apply if periodic payments were ordered.). See *U.S. v. House*, 808 F.2d 508, at page 511).

The *House* 808 F.2d 508 Court specifically states that the Court can only find one case (*i.e., Keith*, 754 F.2d 1388) that considered "whether

3579(f) imposes a limit" . . . when the judge does not establish a payment schedule at page 511.

18 U.S.C. 3579(b)(2) does not restrict the time limit for collecting restitution if a schedule of payments is not ordered. This is not disputed, and is the only issue the court in *House* 808 F.2d 508 (7th Cir. 1886) decided.

The *House* Court (apparently) then used this finding to rule that 18 U.S.C. 3579(f)(2)(A) did not limit the collection of restitution for a defendant who ***was*** subject to periodic payments, an issue not before that Court nor presented in this Petition.

B. Petitioner's interpretation of 18 U.S.C. 3663(a)(2)(A) is consistent with other sentencing provisions of that statute.

In the case of *U.S. v. Fuentes,* 107 F.3d 1515 (11th Cir. 1997) that court stated that if full payment is not ordered immediately, the sentencing court must order the defendant to pay in periodic payments within a specified time or by a certain specified date. The court in *U.S. v. Fuentes,* 107 F.3d 1515 then states that the amount to be paid shall be in an amount, the defendant can pay

Ninth Circuit precedent also supports this concept:

> Only a defendant whom the court finds to be destitute and unable to pay any restitution in the future is eligible for a nominal restitution order.

18 U.S.C. § 2327(b)(4)(D). *U.S. v. Baggett,* 125 F. 3d 1319 - Court of Appeals, 9th Circuit 1997.

This interpretation is supported by the requirement that the court have information about the defendant's financial condition prior to sentencing and not order a defendant to pay more than he or she can pay. *See section I.D. below,*

C. In contrast, the interpretation of the 9th circuit conflicts with other sentencing powers of the district court

The idea that 18 U.S.C. 3663 (a)(2) restricts the court's power to defer restitution more than five years conflicts with the power of the court (under the VWPA) to order no restitution at all.

D. A district court should not order restitution in an amount greater than the defendant can pay

Petitioner contends that it is error to order restitution from a defendant who is unable to pay the restitution, *U.S. v. Ramilo*, 986F.2d 333, 336 (9th Cir. 1993), and "[a] restitution order that exceeds the authority under the VWPA is equivalent to an illegal order" *U.S. v. Jennings*, 2001 U.S.Dist. LEXIS 9554, 6-7 (D. Or. June 26, 2010); *U.S. v Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999). *U.S. v. McIllvain*, 967 F.2d 1479, 1481 (10th Cir. 1992) ("When a district court orders restitution it must be consistent with a defendant's ability to pay"). The government's position conflicts with the language of the judgment, see *United States v. Roush*, 452 F. Supp.2d 676, 680 (N.D.. Tex. 2006). It would have been an abuse of discretion not to consider the "inability to pay" factor. *U.S. v. Remillong*, 55 F.3d 572, 574 (11th Cir. Fla. 1995) (citing U.S.S. G. 5E1.1); *U.S. v. Mitchell*

(1990, CA8 Mo) 8893 F.2d 935; *U.S. v. Sanders* (1996, CA6 Ky) 95 F.3d 449 (remand is required if there was no on-the-record consideration for 18 U.S.C. 3664 factors); *U.S. v. McGlothlin* (2001, C8 Ark) 249 F.3d 783 (district court abused its discretion by imposing immediate payment of full amount of restitution, where defendant had no income and no assets and court waived payment of fine); *U.S. v. English*, 92 F.3d 909, 917 (9th Cir. Cal. Oct. 25, 1996).

Petitioner contends that the purpose of the mandatory finding is explained by the court in *U.S. v.Kindelay*, 2007 U.S. Dict. LEXIS 61680 (D. Ariz. Aug. 20 2007) citing *U.S. v. Ramilo*, 986 F.2d 333, 336 (9th Cir. 1993) (bold added):

> Because it is important that criminal defendants' have at least a hope of fulfilling and complying with each and every order of the court,' **restitution may not be entered if the record does not reflect any evidence that the defendant is presently able, or in the future may be able, to pay the amount ordered** . . . [T]he district court erred in ordering restitution because it failed to find that Lawrence had the ability to pay restitution. The district court ordered restitution notwithstanding its belief that thee change that Lawrence would pay t he restitution was 'slim and non.' By failing to consider Lawrence's ability to pay restitution, the district occur

> abused its discretion. *Smith* 944 F.2d at 623. The district court failed to consider the evidence in the presentence report of Lawrence's negative net worth and poor employment history, which clearly indicted the impropriety of a restitution order. [ ] Moreover, if the district court did find the Lawrence had the ability to pay a restitution order, that finding was clear error. The district court's determination that Lawrence might publish and profit from his life story is too slender a reed upon which to rest an order requiring Lawrence to pay more than one million dollars in restitution. The court clearly erred in finding that Lawrence had the ability to pay the large restitution it ordered. We note, as further support, that the district court waived the imposition of a fine, which is only permissible if a defendant 'is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay.' U.S.S.G. 5E1.2(f). It was error for the district court to waive a fine but impose restitution on Lawrence.

The applicable law "specifically directs a sentencing judge to consider not only the victim's injury, but also the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependants, and such other factors as the court deems appropriate.' "

U.S. v. Barnette, 10 F.3d 1553, 1556 (11th Cir. 1994) (quoting 18 U.S.C. 3664(a)). "This requirement ensures that a defendant will be able to pay restitution, and also ensures that restitution payments will not unduly limit his right to appeal." *U.S. v. Kress*, 944 F.2d 155, 163 (3d Cir. 1991), *cert. denied* 502 U.S. 1092 (1992).

Petitioner asserts that "[a] district court's failure to make a restitution order with which a defendant could possibly be expected to comply threatens respect for judicial orders generally. "*U.S. v. Bailey*, 975 F.2d 1028, 1031 (4th Cir. 1992); see *U.S. v. Mahoney*, 859 F.2d 47, 52 (7th Cir. 1988). ("An impossible order of restitution . . . is nothing but a sham for the defendant has no chance of complying with the same, thus defeating any hope of restitution and impeding the rehabilitation process."). thus, "we will not uphold the district court's exercise of discretion if the record is devoid of any evidence that the defendant is able to satisfy the restitution order." *U.S. v. Patty*, 992 F.2d 1045, 1052 (10th Cir. 1993).

The judgment did not ignore the mandatory finding but implemented the Mandatory finding – it is the Government's enforcement proceeding which ignores the Mandatory Finding (that Petitioner cannot pay). *U.S. v. Lucas*, 1995 U.S. App. LEXIS 35950 (6th Cir. Ky. Oct 10, 1995) ("Having made such a clear and unequivocal finding of fact, the district court was not free to disregard it"); *U.S. v. Alvarez*, 917 F.2d 300, 303 (6th Cir. 1991) ("having made the finding that Alvarez testified untruthfully as to a material fact while under oath, the district court had

no discretion under the Sentencing Guidelines in applying 3C1.1"), *cert. denied* 500 ("the problem with the Tax court's analysis is that it ignores its own fact findings"); *U.S. v. Futrell*, 209 F.3d 1286, 1289 (11th Cir. Fla. 2000) ("the district court's refusal to consider the Futrell's' ability to pay restitution is a matter of statutory interpretation, which we review de novo") citing *U.S. v. Pemco Aeroplex, Inc.* 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc).

II. CASES CITED BELOW WHICH SUPPORT THE GOVERNMENT'S POSITION DO NOT CONCERN A DEFENDANT ORDERED TO MAKE PERIODIC PAYMENT AND SO ARE NOT APPLICABLE

The district court cited *U.S. v. Mays*, 430 F.3d 963 (9th Cir. 2005) in support of the Gov'ts position that 18 U.S.C. 3663(a)(2) is not a limitation on collection.

The Ninth Circuit in its Memorandum opinion cited the following cases in support:

U.S. v. Soderling 970 F.2d 529, 535 N. 12 (9th Cir. 199)

U.S. v. House 888 F.2d 508, 511-12 (7th Cir. 1986)

U.S. v. Keith 754 F.2d 1388, 754 F.2d 1388, 1391 (9th Cir. 1985)

U.S. v. Young 593 F.2d 773, 774 (8th Cir. 2010)

U.S. v. Rossi 592 F.3d 372, 375 (2d Cir. 2010)

U.S. v. Ridgway 489 F.3d 732, 735-737 (5th Cir. 2007)

FDIC v. Dover 453 F.3d 710, 715-16 (6th Cir. 2006)

U.S. v. Fuentes 107 3d 1515, (11th Cir. 1997)

None of these cases offer unambiguous support for the Gov't's position.

U.S. v. Soderling 970 F.2d 529, 535 N. 12 (9th Cir. 199) and *U.S. v. House* 888 F.2d 508, 511-12 (7th Cir. 1986) and *U.S. v. Keith* 754 F.2d 1388, 754 F.2d 1388, 1391 (9th Cir. 1985) Support the Gov't's position only in dicta as argued supra.

The case of *U.S. v. Mays*, 430 F.3d 963 does not concern the VWPA, but instead the subsequent statute – the MVRA which is not relevant to this case.

The opinion in *U.S. v. Young*, 593 F.3d 733, 774 does not state whether the defendant was ordered to pay periodic payments. In addition, the appeal in U.S. v. Young, 593 F.3d 733 was dismissed as "premature."

The opinion in *U.S. v. Rossi*, 592 F.3d 372 (2010) supports the Petitioner. The court in *Rossi* 592 F.3d 372 points out that the defendant, Ms. Rossi, was not ordered to make periodic payments, and implies that U.S.C. 3663(f)(2) does impose a time limit (where periodic payments are ordered.).

In *U.S. v. Ridgeway* 489 F.3d 732 there is no mention whether the appellant had been ordered to make periodic payments for restitution or not (Ridgeway did sign a promissory note to the victim at the end of probation promising to pay $100 per

month). See section III (b) below on statements of the Court in *Ridgeway* concerning the lack of a reason for 18 U.S.C.3663(a)(2)(A) if the position the Government asserts (in the case at Bench) is accepted···and on the necessity of finding a statute ***superfluous*** if that position is correct. (which the Court in *Ridgeway* 489 F.3d 732 did so reluctantly find).

In *FDIC v. Dover* 453 F.3d 710 (6th Cir. 2006), the court noted that the appellant (in that case) was ordered to pay "immediately" not, as in the *Joseph* case, "at specified times." This case is not authority for the position stated by the 9th circuit in the case at Bench.

U.S. v. Fuentes 107 3d 1515 also does not support the Government's position (and offers some support for the petitioner). In *Fuentes*, 107 3d 1515, there is no statement that Fuentes had been ordered to make periodic payments for 5 years or that the probationary period had expired. *U.S. v. Fuentes* 107 3d 1515 does not concern the issue at Bench.

Moreover, the court in *Fuentes* stated the following:

> There are statutory limits to the deadline by which full payment must be made. If the court sentences the defendant to probation, it must require that the full amount of restitution ordered be paid by the end of the period of probation. 18 U.S. C. 3663(f)(2)(A). When no probation is ordered, the court must require restitution within five years of the end of the term of imprisonment

> imposed, or if no imprisonment is imposed, within five years of the date of sentencing, 18 U.S.C. 3663(f)(2)(B),(C). The sentencing court must fashion a restitution order so that the defendant reasonably will be able to comply with the order within the statutorily mandated time period. See *Remillong*, 56 F.3d at 575 n. 8

U.S. Fuentes, 107 F.3d 1515, 15.

Fuentes cannot be use to support the theory that Petitioner must pay $14 million in restitution and be under this burden for 20 years or more.

III. IF 18 U.S.C. 3663 IS AMBIGUOUS UNDER THE *RULE OF LENITY* PETITIONER'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.

> Even were the statutory language regarding the scope of a court's authority to order restitution ambiguous, longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, *Simpson v. United States,* 435 U.S. 6, 435 U.S. 14 – 15 1978) (applying rule of lenity to federal statute that would enhance penalty), preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history. *See Crandon v. United States,* 494 U.S. 152, 494 U.S. 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history of statutory policies will support a construction

> of a statute broader than that clearly warranted by the text").

Hughey v. United States, 495 U.S. 411, 422 (1990).

If the restitution obligation is ambiguous in any way, the ambiguities in the judgment are to be interpreted against plaintiff. *U.S. v. Rodgers*, 101 F.2d 247, 253 (2d Cir. 1996). "Any reasonable doubt or ambiguity arising in connection with the true meaning and intent of the sentencing court will be resolved in favor of defendant." *Subas v. Hudspeth* , 122 F.2d 85, 86 (10th Cir. 1941); *U.S. v. Naas*, 755 F.2d 1133, 1136 (5th Cir. 1985) (presumption of concurrency "resolves any ambiguity in favor of the defendant"); *Gaddis v. U.S.*, 280 F.2d 334, 336 (7th Cir. 1960) (per curiam) ("Where there is any ambiguity, the prisoner is entitled to have the language in the pronouncement construed most favorable to him"); *U.S. v. Anderson*, 1008 U.S. App. LEXIS 23912 (D.C. Cir. 2008). Justice Frankfurter in *Bell v. U.S.*, 349 U.S. 81 83 (1955) explained that "]i]t may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." As explained by the Ninth circuit court of Appeal in *U.S. v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999):

> Due to the two impossible interpretations, we hold that the plea agreement is ambiguous regarding the amount of restitution, and therefore, the waiver of appeal of the restitution order cannot be held to have been

voluntarily and knowingly entered into by the defendant.

A. **Is 18 U.S.C. 3663 ambiguous?**

The fact that about half the circuits hold one view and half the other would indicate (based on objective criteria) that 18 U.S.C. 3663(a)(2)(A) is ambiguous. The Courts' which find that this statute is not ambiguous and that the statute clearly is only a limitation on the deferment of full restitution adopt the view expressed in *United States v. House*, 808 F.2d 508, 510 (7th Cir.).

"Restitution is a debt, which may be collected using the means appropriate to other debts. 18 U.S.C. 3579(h). Debts do not abate after five years . . ." *United States v. House*, 808 F.2d 508, 510 (7th Cir.).

B. **The Court in *United States v. Ridgway* 489 F.3d 732, 735-737 (5th Cir. 2007), although upholding the Government's position indicates how that position requires ignoring some of the usual rules of statutory construction---thus showing that the statute is ambiguous or is being misread.**

In finding that restitution is not limited in time the Court in *United States v. Ridgway* 489 F.3d 732, 735-737 (5th Cir. 2007) finds the "purpose" of 18 U.S.C. 3663(a)(2) "unclear" and feels it must render another statute "superfluous." (to uphold the Government's position, which the Court does).

The Court in *United States v.Ridgeway*, 489 F.3d 732, 735-737 (5th Cir. 2007) states that the

purpose of limiting payment periods to five years is unclear when collection is allowed to continue so far beyond that time.

The *Ridgeway* Court's statement that "collection is allowed to continue so far beyond that time . . ." is also somewhat tentative. The *Ridgway* court acknowledges that the statute allowing future enforcement, 18 U.S.C. 3663(f)(1) – (3) 1993), specifically refers to fines – and states that ignoring this distinction "would seem to violate a cardinal rule that statutory language not be rendered superfluous . ." *United States v. Ridgeway* 489 F.3d 732, 735-737. Despite this, the *Ridgeway* Court rules against the defendant in that case (a defendant who was not ordered to make periodic payments as a condition of probation.).

IV. 18 U.S.C. 3663 (f)(1)(2) IS NOT AMBIGUOUS AND CLEARLY RESTRICTS THE TIME TO COLLECT RESTITUTION FOR DEFENDANTS PUT ON A PAYMENT SCHEDULE

The appellant in *United States v. House* 888 F.2d 508, 511-12 (7th Cir. 1986) and even the Government agreed that 18 United States Code 3663(a)(2) clearly restricted the time for collection of restitution for defendants put on a payment schedule.

Despite the Government's confession of error, the Appellate court found there was no such restriction.

Why were both parties in *House*, 888 F.2d 508 (and numerous other Circuit Court's) so sure that 18 U.S.C. 3663 (f)(1) and (2) is a restriction on the time to collect?

The reason is that the statute is not unclear or ambiguous.

The statute states:

> " . . . (f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.
>
> (2) the . . . last **such installment** shall not be later than – (A) the end of the period of probation . . .

a. *18 U.S.C. 3663(f)(1)(2).*

The phrase **such installment** in this statute refers to either the "require(d) installment and/or the "specified" installment mentioned in paragraph(f)(1).

Had those words been used instead of "such" it would be clear that the last "required" installment cannot be "required" after probation is terminated, or that the statute only "specifies" a last installment before probation is terminated.

The circuits are nevertheless split on the clarity of this statute; a split petitioner respectfully requests this Court to resolve.

A. **Has Petitioner waived the protections of 18 U.S.C. 3663(a)(2)(A) by stipulating to the amount of restitution?**

"Parties to a plea agreement cannot increase the statutory powers of the sentencing judge to authorize restitution simply by stipulating to restitution beyond that allowed under the relevant version of the Act." *United States v. Young,* 953

F.2d 1288, 1290. *See U.S. v. Soderling*, 970 F.2d 529, 533 (9th Cir. 1992) for a contrary view.

Petitioner stipulated to the amount of restitution – not to waiving the time limit for collection for a defendant put on a payment schedule. (If Petitioner's view is correct)

V. THE NINTH CIRCUIT'S OPINION DOES NOT ADDRESS WHETHER THE RESTITUTION ORDER CAN BE ENFORCED AS A CIVIL DEBT (FOR UP TO 20 YEARS)

For that reason, the argument that the Government can use the FDCPA to enforce a judgment of restitution should not be a bar to this Court granting a writ of certiorari.

A. The length of time civil enforcement mechanisms may be used does not determine the length of the life of a judgment that is statutorily limited in duration.

Petitioner agrees that civil debt collection statutes can be used to collect on or enforce an order of restitution. However, the length of time (i.e., 20 years) that an enforcement mechanism may be used does not determine the length or lifetime of the order being enforced.

If it is determined that the restitution order in this case means "defendant must pay during probation, and no longer" then there is no argument that the Government can use the FDCPA or state court statutes to collect (just like an ordinary debt).

However, it does not follow that because civil collection statutes can be used for up to 20 years that a judgment which itself is only applicable for 5 years (or until the end of probation) will be extended.

B. The Sentencing Court contemplated the Petitioner paying restitution after the termination of Probation---does that weigh against granting this Petition?

No. The argument made *supra* in IV (a) applies here. In addition an order that Petitioner pay restitution after the termination of probation "as directed by the United States Attorney" is beyond the power of the Court to make and is an improper delegation of judicial authority. (It is also, by it's own terms, not an order to pay any amount).

CONCLUSION

For the foregoing reasons, Petitioner STEPHEN J. MURPHY prays that this Court grant his petition for writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit upholding the District Court's dismissal of the motion to quash the writ of garnishment and dismiss the case under which that writ was issued.

Respectfully submitted,

David A. Smyth
1990 N. California Blvd., #830
Walnut Creek, CA 94596
(925) 933-4541
smythlaw@gmail.com
Attorney for Petitioner

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

STEPHEN J. MURPHY, Defendant-Appellant.

No. 09-55782.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted June 11, 2010
— Pasadena, California.
Filed July 1, 2010.

Before: TROTT and W. FLETCHER, Circuit Judges, and MAHAN, District Judge.**

NOT FOR PUBLICATION

MEMORANDUM*

Stephen Murphy appeals from the district court's order denying his motion to dismiss the government's writ of garnishment action seeking to enforce a $14 million criminal restitution judgment against him. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

**The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Murphy's restitution order is governed by the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663 (1988).[1] *See United States v. Bussell,* 414 F.3d 1048, 1061 (9th Cir. 2005) (noting that the VWPA governs orders of restitution for offenses committed prior to 1996).

The government's enforcement action is not time-barred. The restitution order remains enforceable even though Murphy was released from imprisonment more than five years ago. See *United States v. Soderling*, 970 F.2d 529, 535 n.12 (9th Cir. 1992) ("'[The five-year limit in § 3663(f)(2)(B)] protects the victim, not the offender. It limits the duration of a grace period . . . and does not terminate the obligation to make restitution.'" (quoting *United States v. House*, 808 F.2d 508, 511-12 (7th Cir. 1986)); *United States v. Keith*, 754 F.2d 1388, 1393 (9th Cir. 1985) ("The district court apparently mistakenly assumed that subsection 3579(f)(2)(B)[2] defines the period for payment of restitution ordered under the Act. It does not. It merely defines the maximum payment period that may be specified." (footnote added, footnote omitted)); see also *United States v. Young,* 593 F.3d

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[1]Subsection (f) of § 3663 was repealed in 1996 by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 205. Unless otherwise noted, references to § 3663 will be to the version in effect in 1992 under the VWPA.

[2]Former 18 U.S.C. § 3579(f) was renumbered as 18 U.S.C. § 3663(f) by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, §§ 212(a).

773, 774 (8th Cir. 2010) (per curiam); *United States v. Rossi*, 592 F.3d 372, 375 (2d Cir. 2010); *United States v. Ridgeway*, 489 F.3d 732, 735-37 (5th Cir. 2007); *FDIC v. Dover*, 453 F.3d 710, 715-16 (6th Cir. 2006); *United States v. Fuentes*, 107 F.3d 1515, 1533 n.33 (11th Cir. 1997); *House*, 808 F.2d at 511.[3]

Murphy waived his right to challenge the amount of restitution ordered in the judgment by failing to file a direct appeal from that judgment. See *United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008).

Murphy waived any argument that the restitution order is ambiguous by not raising that argument in his opening brief. See *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005). Moreover, such an argument lacks merit in light of Murphy's plea agreement, in which he agreed to pay full restitution for the losses caused by his conduct.

AFFIRMED.

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[3]But see *United States v. Bruchey*, 810 F.2d 456, 459-60 (4th Cir. 1987) (noting that when a court orders restitution in installments, the VWPA "clearly limits the period within which restitution is due" to five years after the end of the term of imprisonment (quotation omitted)); *United States v. Brown*, 744 F.2d 905, 911 (2d Cir. 1984) ("Recognizing that indigency may be temporary, Congress provided for payment of restitution during a period of up to five years after the completion of any prison sentence imposed.").

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs. CASE NO. CV 08-6520-R (SSx)

STEPHEN J. MURPHY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO (1) DISMISS THIS ACTION, (2) QUASH THE WRIT OF GARNISHMENT, (3) CORRECT THE JUDGMENT, (4) COMPEL PLAINTIFF TO FILE A PARTIAL ACKNOWLEDGMENT OF SATISFACTION OF JUDGMENT; OR ALTERNATIVELY, (5) CONTINUE PENDING MATTERS AND STAY ALL ENFORCEMENT PROCEEDINGS, AND (6) GRANT RELATED RELIEF

Defendant Stephen J. Murphy ("Murphy") was convicted of mail fraud and loan application fraud in 1999. He was incarcerated until September 2002, and he was under supervised release until September 2007. The Judgment of March 15, 1999 set Murphy's total restitution at $14,048,372.32 and ordered monthly payments of $500 towards this restitution during the period of supervised release. The Judgment

also provided that "[i]f the amount of restitution remains unpaid after the termination of supervision, the balance shall be paid as directed by the United States Attorney's Office."

Murphy now claims that he cannot be held responsible for the remaining unpaid restitution because his period of supervised release has ended. This argument is contrary to the clear terms of the Judgment, which explicitly endorses restitution collection actions by the U.S. Attorney's Office subsequent to the period of supervised release. Murphy's attempts to manufacture statutory or *ex post facto* problems with the Judgment are unavailing. Under the Victim Witness Protection Act, the controlling law at the time of Murphy's sentencing, restitution debts do not terminate along with the supervised release; rather, they remain enforceable until "the later of 20 years from the entry of judgment or 20 years after the release from imprisonment of the person fined, or upon the death of the individual fined." 18 U.S.C. §§ 3613(b), ©, (f), 3664(m) (Supp. IV 1999) (as amended by Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 207(c)(3), 100 Stat. 1214, 1238–39). Even before 1996, when Murphy's offenses were committed, restitution debts did not expire until twenty years after the entry of the judgment. 18 U.S.C. §§ 3613(b), ©, (f) (1988); *id.* (1994). Further, the Ninth Circuit recently rejected the argument that termination of the period of supervised release precludes any later garnishment. *U.S. v. Mays*, 430 F.3d 963, 967 (9th Cir. 2005). In short, Murphy presents no justification to depart from the clear

language of the Judgment.

IT IS HEREBY ORDERED that Defendant's Motion to: (1) Dismiss This Action, (2) Quash the Writ of Garnishment, (3) Correct the Judgment, and (4) Compel Plaintiff to File a Partial Acknowledgment of Satisfaction of Judgment; or Alternatively (5) Continue All Pending Matters and Stay All Enforcement Proceedings, and (6) Grant Related Relief is DENIED.

DATED: May 11, 2009.

/s/

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

United States District Court
Central District of California

UNITED STATES OF AMERICA vs.

Defendant	STEPHEN J. MURPHY
Residence	8709 Pershing Drive Playa Del Rey, CA 90290
CR	97-462(A)-WJR
Social Security #	551-76-3702
Mailing Address	SAME

[DATE STAMP]
ENTERED
CLERK, U.S. DISTRICT COURT
MAR 19 1999
/s/ DEPUTY

JUDGMENT AND PROBATION
COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person, on: 03 15 99

COUNSEL:

___ WITHOUT COUNSEL

However, the court advised defendant of right to counsel and asked if defendant desired to have counsel appointed by the Court and the defendant thereupon waived assistance of counsel.

X WITH COUNSEL: Ellen Barry and, Victor Cannon, DFPD, Apptd

PLEA:

X GUILTY, and the Court being satisfied that there is a factual basis for the plea.

__ NOLO CONTENDERE __ NOT GUILTY

FINDING:

There being a finding/verdict of __ GUILTY on __, defendant has been convicted as charged of the offense(s) of:

18 USC 1341, 2(b): Mail Fraud (Counts 1-5 First Superseding Indictment);
18 USC 1014, 2(b): False Statement to a Financial Institution, Causing an Act to be Done (Count 16 First Superseding Indictment).

JUDGMENT AND PROBATION/COMMITMENT ORDER:

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of

Prisons, to be imprisoned for a term of 60 months. This term consists of 60 months on counts 1 through 5 and 60 months on count 16, to be served concurrently.

(SEE NEXT PAGE)

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

____ This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

Signed by, District Judge /s/ William J. Rea
WILLIAM J. REA

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk

Dated/Filed: 03-18-99 /s/
Month/Day/Year Deputy Clerk

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this Judgment:

1. The defendant shall not commit another Federal, State or local crime;

2. The defendant shall not leave the judicial district without the written permission of the court or probation officer;

3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4. the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;

5. the defendant shall support his or her dependents and meet other family responsibilities;

6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7. the defendant shall notify the probation officer

within 72 hours of any change in residence or employment;

8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the

permission of the court;

14 as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to conform the defendant's compliance with such notification requirement;

15. the defendant shall not possess a firearm or other dangerous weapon;

16. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours

These conditions are in addition to any other conditions imposed by this Judgment

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____
Defendant noted appeal on _____
Defendant released on _____
Mandate issued on _____
Defendant's, appeal determined on _____
Defendant delivered on _____ to _____
at _____ the institution designated by the Bureau of Prisons, with a certified copy of the Within

Judgment and Commitment.

UNITED STATES MARSHAL

DATED: _____ by: _____

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

CLERK, U.S. DISTRICT COURT

DATED:_____ BY: _____

Upon release from imprisonment, the defendant shall placed on supervised release for a term of five (5) years. This term consists of three (3) years on each of counts 1 through 5; and, five (5) years on count 16, all such terms to run concurrently. under the following terms and conditions:

The defendant shall comply with the rules and regulations of the United States Probation Office and General Order 318;

The defendant shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing, as instructed by the Probation Officer. The defendant shall abstain from using illicit drugs, alcohol, and abusing prescription medications during the period of supervision;

During the period of community supervision the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment;

The defendant shall notify the Court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. fines or special assessments;

As directed by the Probation Officer, the defendant shall provide to the Probation Officer a signed release authorizing credit checks and an accurate financial statement, with supporting documentation, as to all sources and amounts of income and all expenses of the

defendant, including any assets owned or controlled by the defendant. In addition, the defendant shall provide federal and state income tax returns as requested by the Probation Officer;

The defendant shall not obtain or possess any driver's license, social security number, birth certificate, passport or any other form of identification without the prior written approval of the Probation Officer; further, the defendant shall not use, for any purpose or in any manner, any name other than his true legal name.

The defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer and shall maintain a single personal bank account into which all income, financial proceeds and gains shall be deposited and from which all expenses shall be paid;

The defendant shall not engage, as whole or partial owner, employee or otherwise, in any business involving loan programs, telemarketing activities, investment programs or any other business involving the solicitation of funds or cold-calls to customers without the express approval of the Probation Officer prior to engagement in such employment. Further, the defendant shall provide the Probation Officer with access to any and all business records, client lists and other records pertaining to the operation of any business owned, in whole or in part, by the defendant, as directed by the defendant, as directed by the Probation Officer;

The defendant shall not be employed in any position that requires licensing and/or certification by any local, state or federal agency without prior approval of the Probation Officer.

Pursuant to Section 5E1.2(e) of the Guidelines, all fines are waived.

It is ordered that the defendant shall pay to the United States a special assessment of $300, which is due immediately.

It is ordered that the defendant shall pay restitution in the total amount of $14,048,372.32 pursuant to 18 USC 3663. (SEE ATTACHED LIST SETTING FORTH THE AGGRIEVED PARTIES, AND THE RESTITUTION AMOUNTS ORDERED).

The amount of restitution ordered shall be paid as set forth on the list attached to this judgment. If the defendant makes a partial payment, each payee shall receive approximately proportional payment, unless another priority order or percentage payment is specified in this judgment.

Restitution shall be due during the period of imprisonment, as directed by the Court or the United States Attorney, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If any amount of the restitution remains unpaid after release from custody, nominal monthly payments of $500 shall be made during the period of supervised release. These payments shall begin 30

days after the commencement of supervision.

Nominal restitution payments are ordered as the Court finds that the substantial restitution amount and the defendant's economic circumstances might not allow for either immediate or future payment of the amount owed.

If the amount of restitution ordered remains unpaid after the termination of supervision, the balance shall be paid as directed by the United States Attorney's Office.

Until restitution has been paid in full, the defendant shall notify the Attorney General of any change in the defendant's mailing address or residence address, no later than thirty (30) days after the change occurs.

The defendant shall notify the Court, through the Probation Office, and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution.

It is further ordered that the defendant shall surrender himself to the institution designated by the Bureau of Prisons on or before April 19, 1999, 12:00 NOON. In the absence of such designation, the defendant shall surrender himself to the United States Marshals Service, located at the United States Courthouse, 312 North Spring Street, Main Street Level, Los Angeles, California, 90012 on or before April 19, 1999, 12:00 NOON.

In the interest of justice, the Government moves to dismiss the remaining counts in the first superseding indictment, and, the underlying indictment. IT IS SO ORDERED.

The Court recommends that the defendant be incarcerated at Nellis Airforce Base.

THE BOND IS ORDERED EXONERATED UPON SURRENDER.

VICTIM LIST OF INDIVIDUALS

Case Name: Stephen Murphy
Docket No.: 97-00462

	Victim Name	Amount
1.	Robert Alpers	$ 54,951.67
2.	Robert Anderson	$ 17,008.37
3.	John Armstrong	$ 82,153.28
4.	Gerard Aucoin	$ 23,666.68
5.	Margaret Avignon	$ 25,000.00
6.	Henry Bailey	$ 35,000.00
7.	Howland & Betty Bailey	$149,000.00
8.	Joseph Bailey	$ 25,000.00
9.	Lee & Florence Barker	$ 55,000.00
10.	Milton Barker	$ 64,646.67
11.	Wallace J. Bauchiero	$ 30,601.13
12.	Frances Benton	$ 75,000.00
13.	Ray Bilile	$ 60,490.00
14.	Jerry & Wilene Boley	$ 26,117.99
15.	Richard Borghi	$ 62,955.57
16.	Elizabeth Bradford Moore	$ 25,000.00
17.	Lloyd Bryant	$208,461.12
18.	Eugene Bullington	$836,401.06
19.	William Burkhart	$ 67,966.70
20.	Henry Burtschi	$310,881.23
21.	Walt & Marilyn Cable	$129,016.68

22.	Robert Campbell	$ 24,083.32
23.	Doug Carroll	$ 3,020.00
24.	Jerry Castro	$ 92,488.00
25.	Robert & Marie Christman	$ 30,050.03
26.	Jess & Catherine Clemens	$ 55,005.00
27.	James & Maria Cockrum	$ 72,666.69
28.	James & Patricia Coie	$ 25,000.00
29.	Richard H. Colbert	$ 20,466.67
30.	Mildred Colley	$ 44,044.43
31.	Edna Corn	$242,733.34
32.	Renae Cornelius	$ 13,150.00
33.	Robert Crawford	$ 32,463.38
34.	Beatrix Critton	$ 34,062.51
35.	Al de Ciutiis	$ 24,000.01
36.	Dan Dickson	$ 23,666.68
37.	Lee Echert	$ 40,000.00
38.	Todd & Sharla Eisenberg	$ 21,766.70
39.	Richard & Stephanie	$ 39,280.00
40.	Lila Fernyhough	$ 25,721.69
41.	Lawrence J. Fitzgerald	$150,000.00
42.	A. Martyn Fletcher	$ 26,300.00
43.	Ray Galka	$ 45,798.65
44.	Kennedy & Joan Gammage	$ 49,283.33
45.	Jeanne Gillette	$ 27,812.48
46.	Marjorie Goodwin	$ 23,651.68
47.	Carl Greever	$ 24,000.01

48.	Lawrence Groeper	$ 25,000.00
49.	Thomas K. Hale	$191,501.78
50.	Herbert L. Harrison	$ 23,666.68
51.	Larry Harrow	$ 5,404.18
52.	Roger Hart	$ 40,879.21
53.	Andrew Hartanov	$218,873.68
54.	Randy Harthorn	$ 32,630.00
55.	John Harvey	$ 75,941.67
56.	Bill Hing	$103,122.26
57.	Uri & Ruth Hirsch	$ 24,616.67
58.	Victor Hordis	$ 50,000.00
59.	Dennis & Jayne Horn	$115,875.02
60.	William & Jo Ann Horton	$ 60,000.00
61.	Byron Hubanks	$ 25,000.00
62.	Matthew Humiston	$ 17,500.00
63.	Gordon Humphrey	$126,475.30
64.	Joseph Huntly	$ 7,275.00
65.	Donald Jennings	$ 49,333.33
66.	Robert E. Johnson	$ 25,000.00
67.	Eddie & Martha Joseph	$ 50,000.00
68.	Ray Kauffman	$ 25,000.00
69.	Mel & Judith Keifer	$ 12,500.00
70.	Brian Kennedy	$ 67,987.50
71.	Zev Klasewitz	$199,266.67
72.	Monic Kobylt	$ 12,942.63
73.	Michael L. Kolesar	$ 13,150.00

74.	James A. Komarek	$ 8,643.16
75.	John Kregzde	$349,290.25
76.	Mike Kresbach	$ 62,500.00
77.	Rudy Kretschek	$ 11,696.66
78.	Winifred Kues	$ 48,400.02
79.	Reddy Kwan	$ 80,000.00
80.	Bruce LaPlante	$ 14,260.00
81.	Richard LaPointe	$ 22,980.68
82.	Jacki LaPointe	$ 23,080.68
83.	Gary Lee	$ 60,480.00
84.	Beverly Lee	$ 35,520.01
85.	Mary Leonard	$ 24,249.99
86.	Ira Lev	$ 25,000.00
87.	Neal Levin	$ 22,900.00
88.	Robert & Shirley Lindahl	$ 23,786.68
89.	Jon & Julia Linscott	$100,000.00
90.	Lucky Linton	$242,500.00
91.	Nellie Madsen Jacobson	$ 59,083.32
92.	Robert E. McAdam	$836,211.14
93.	Donald McBride	$ 34,520.01
94.	Barry McDonnell	$ 69,533.35
95.	Carl F. Metten	$ 49,500.00
96.	Ray Meucci	$175,000.00
97.	John & Linda Miller	$ 81,638.95
98.	Jack L. Minney	$ 37,624.17
99.	James Moller	$ 17,066.70

100. James & Jean Moore	$ 43,750.00
101. Ivy Mooring	$ 60,000.00
102. Frank Moreno	$ 24,417.66
103. R. Al Morrison	$ 10,863.32
104. Stan and Mildred Murdock	$ 50,000.00
105. Vicki Myers	$ 50,000.00
106. Gary Myerson	$ 46,461.12
107. Red Nason, Jr.	$140,463.67
108. Richard Nason	$195,688.90
109. Bill Newman	$ 34,725.02
110. Elizabeth Oettinger	$ 24,000.01
111. George Onaga	$ 51,896.67
112. Amparo Ordonez	$ 15,006.70
113. Jordan Orosz	$ 16,139.97
114. Robert Owen	$ 25,000.00
115. William Palluth	$ 24,500.00
116. Nancy Patterson	$ 7,620.00
117. Frank P. Pekny	$ 90,175.79
118. Thaddeus Petryni	$ 45,000.00
119. Bert Pfeifer	$137,693.87
120. William and Phyllis Phalen	$225,777.69
121. David Phillips	$ 25,000.00
122. Lynne Pirtle	$216,961.13
123. Jim Porter	$ 50,000.00
124. George Russell Porter Trust	$153,816.69
125. Odette Powell	$ 43,566.68

126. Truman Prewitt	$ 35,000.00
127. Mike and Sharon Rogazione	$ 73,280.00
128. Bob and Sandra Rogers	$ 25,000.00
129. Mike Rogers	$ 49,399.99
130. John and Elaine Rohr	$ 49,394.61
131. Reinhardt Rosenberg	$103,890.01
132. David Ross	$ 74,123.35
133. Gaile Ryan	$ 99,083.32
134. Al Schmid	$123,755.57
135. Edward Schulz	$ 30,949.59
136. Art Schumacher	$ 7,999.99
137. James Shadek	$729,366.75
138. William Shaw	$ 10,753.75
139. John and Ivy Shelton	$273,241.85
140. Donat Shue	$ 23,666.68
141. Christy Simm	$ 10,250.00
142. Shelley Siri	$ 10,000.00
143. Betty F. Srnay	$174,905.09
144. Marion Smith	$ 13,765.36
145. Allen and Helen Smoll	$ 58,166.65
146. Suki Sodi	$ 43,666.70
147. Gilbert Stafford	$100,000.00
148. Edward Summers	$ 2,158.33
149. Allen Sweeney	$ 51,275.00
150. Mark Tanner	$ 22,900.00
151. Virgil and Janet Taylor	$ 35,520.00

152. Dick Telaneus	$ 40,500.02
153. Victor and Patricia Thaemert	$ 24,000.01
154. G. Al Tobey	$ 56,999.98
155. Donald Upton	$ 71,913.86
156. Dick Van Note	$400,000.00
157. Abe Van Den Broek	$135,199.09
158. Earl Vincent	$ 44,192.59
159. Willis D. Vinson, Jr.	$ 24,750.00
160. Charles A. Vollmer	$ 38,150.00
161. Gary Wade	$ 57,850.58
162. Doris Wallstrorn	$155,000.00
163. Joseph J. Warnas	$ 5,260.00
164. Barrett and Sondra Warner	$ 10,200.00
165. Eugene Weigand	$ 88,411.12
166. Robert and Jean Weise	$ 50,000.00
167. John White	$ 25,000.00
168. Robert and Melinda	$ 25,000.00
169. Jeff Wilson	$ 25,000.00
170. Harold Winnett	$ 95,587.48
171. Bruce Yates	$ 23,455.57
172. Edward Yoshida	$ 49,944.44
173. Phil and Roseanne Ziegler	$ 50,000.00
SUBTOTAL ACI	**$13,225,692.32**
174. Dr. James C. Meadows	$503,800.00
175. Susan Aguiar	$ 85,900.00
176. B. Jerry Bradley	$187,000.00

177. Leroy Randolph	$ 7,500.00
178. Miroslaw Wiater	$ 30,980.00
179. Paul Williamson	$ 7,500.00
SUBTOTAL ATM GLOBAL	**$822,680.00**
TOTAL RESTITUTION:	$14,048,372.32

Defendant: Stephen J. Murphy
Case Number: CR 97-462(A)WJR

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

[DATE STAMP]
FILED
CLERK, U.S. DISTRICT COURT
MAR 18 1999
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

Guideline Range Determined by the Court:

Total Offense Level:	24	
Criminal History Category:	II	
Imprisonment Range:	57 to 71	months
Supervised Release Range:	3 to 5	years
Fine Range:	$10,000 to $ 1M	

☒ Fine is waived or is below the guideline range,

because of the defendant's inability to pay Restitution: $14,048,372.32

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):
Defendant in a large investment group earning $18,000,000

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):